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PAULEY CONSTRUCTION, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC  
COMPANY, PAULEY  
CONSTRUCTION, INC., TRAFFIC  
SOLUTIONS, INC., ADELPHIA  
TELECOMMUNICATIONS CO., INC.,  
SBC TELECOMMUNICATIONS, INC.,  
MOBILE TOOL INTERNATIONAL, INC.  
dba TELSTA, COUNTY OF  
MENDOCINO, STATE OF  
CALIFORNIA, PACIFIC BELL  
TELEPHONE COMPANY, PACIFIC  
TELESIS GROUP, SBC OPERATIONS,  
INC., and DOES 1 to 50,

Defendants.

AND RELATED CROSS-ACTION.

CASE NO.: C07 2257 CW

**PAULEY CONSTRUCTION, INC.'S.  
REPLY TO ADELPHIA  
COMMUNICATIONS CORPORATION'S  
OPPOSITIONS TO PAULEY'S MOTION  
TO DISMISS FOR FAILURE TO STATE  
A CLAIM UPON WHICH RELIEF MAY  
BE GRANTED [F.R.C.P. 12(b)(6)] &  
MOTION TO REMAND TO STATE  
COURT [28 U.S.C. §1447( c)]**

Date: June 28, 2007  
Time: 2:00 p.m.  
Location: Courtroom 2, 4th Floor  
Judge: Claudia Wilken  
1301 Clay Street  
Oakland, CA 94612

**I.**

**ADELPHIA FAILED TO COMPLY WITH JUDGE WILKIN'S MAY 15, 2007 ORDER  
REQUIRING OPPOSITIONS AND REPLIES TO BE CONTAINED  
WITHIN A SINGLE BRIEF**

According to Honorable Judge Claudia Wilken's May 15, 2007 Case Management

PAULEY CONSTRUCTION, INC.'S. REPLY TO ADELPHIA  
COMMUNICATIONS CORPORATION'S OPPOSITIONS TO  
MOTION TO DISMISS & MOTION TO REMAND TO STATE COURT  
[28 U.S.C. §1447( c)]; C072257CW

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1 Scheduling Order For Reassigned Civil Case, "Opposition to the motions (contained within a  
2 single brief) shall be due June 7, 2007..." Adelphia ignored this order and served its Oppositions  
3 in two separate briefs.

## 4 II.

### 5 PAULEY'S REPLY TO ADELPHIA'S OPPOSITION TO MOTION TO REMAND

#### 6 A. The Bankruptcy Court Does Not Have Jurisdiction, Since the Outcome of 7 Adelphia's Second Amended Cross-complaint Has No Conceivable Effect On 8 the Estate Being Administered in Bankruptcy.

9 Adelphia begins its Opposition by mistakenly stating that "Because the jurisdiction is  
10 exclusively with the Bankruptcy Court, the timing of removal is immaterial." In fact, Federal Rule  
11 of Bankruptcy Procedure 9027(a)(3) provides for the timing of removal where the bankruptcy  
12 proceeding was filed before the state civil action was filed, such as here. As stated in Pauley's  
13 Motion to Remand, Adelphia did not timely remove under this Rule. Timing is certainly material.  
14 In addition, Federal Courts have discretionary power to abstain from exercising jurisdiction under  
15 U.S.C. § 1334 ( c)(1) in the interests of justice, or in the interest of comity with State courts or  
16 respect for State law. The court may remand on any equitable ground. 28 U.S.C. § 1452(b).

17 Next, Pauley has been completely consistent with its position since Adelphia first Cross-  
18 complained against it in November 2005. Specifically, Pauley has plainly and repeatedly argued  
19 that (1) Adelphia's nonpayment under the contract constituted a breach, (2) Adelphia rejected the  
20 contract, which is deemed a material breach, immediately before Adelphia filed bankruptcy, since  
21 it never assumed the executory contract and (3) Pauley does not owe Adelphia indemnity, since  
22 Adelphia was negligent and that negligence was a proximate cause of Mr. Tuiaki's injuries.  
23 Adelphia has never established that Pauley owes it indemnity, as the indemnity clauses in the  
24 contract are ambiguous, insofar as they are silent as to Adelphia's own negligence. Nor has  
25 Adelphia established that Pauley received "an additional \$5,000,000 benefit," as argued at page 2,  
lines 16-18.

26 In fact, this was the very basis of Adelphia's motion for summary adjudication, filed  
27 against Pauley, which was denied on August 2, 2006. San Francisco Superior Court Judge Peter J.

1 Busch ruled that "Adelphia's Motion for Summary Adjudication is denied because, considering  
2 the admissible evidence in the light most favorable to responding party, there is a triable issue of  
3 material fact whether Adelphia's active negligence caused the accident." Adelphia merely  
4 assumes that it is entitled to indemnity from Pauley. However, this purported indemnity obligation  
5 has been adjudicated and denied. Pauley does not owe negligent party Adelphia indemnity.

6 In addition, Pauley was not made whole by Adelphia for the work it performed on the  
7 Mendocino project. On September 30, 2003, Pauley submitted a compromised claim to the  
8 Bankruptcy Court, its only recourse to ensure that it received some amount for the work that it  
9 performed for Adelphia. In December 2003, Pauley assigned the claim to a third party assignee for  
10 less than the amount of the claim. Adelphia's failure to pay Pauley for its work put Pauley in a  
11 precarious financial position, requiring it to assign its claim for a reduced amount. Had Pauley  
12 waited, and not assigned the claim, then it would have taken nearly five years for satisfaction of  
13 the claim (June 25, 2002 bankruptcy filing by Adelphia through January 5, 2007, when the  
14 Bankruptcy Court purportedly confirmed Adelphia's plan and stock, not cash, was provided to  
15 Pauley's assignee).

16 Adelphia has not submitted the confirmation as an exhibit, instead it refers Pauley and the  
17 Court to its Second Amended Cross-complaint stating, without any supporting documentation, that  
18 "The Bankruptcy Court allowed Pauley's proof of claim for payment of the full amount of  
19 \$5,827,519.66...by payment of cash and Time-Warner Cable common stock." Of course stock is  
20 not the same as cash, so Pauley does not know if the claim was satisfied in full. This contention is  
21 based solely on the representation of Adelphia in its pleading. Nevertheless, this is irrelevant to  
22 the issue of an obligation to indemnify.

23 Pauley's claim was filed in September 2003 and its assignment of the claim to Canpartners  
24 Investments IV, LLC was executed on December 18 2003, *about two years before* Adelphia filed  
25 its Cross-complaint against Pauley. By 2002, Pauley knew that the contract had been breached by  
26 Adelphia. Further, Pauley knew that Adelphia did not assume the contract, so it correctly stated in  
27 the assignment (but never in the claim itself, as Adelphia incorrectly states) that Pauley owed no

1 obligations Adelphia. (See Opposition page 2, lines 8-11 and page 4 lines 16-24.)

2 Moreover, the cases cited by Adelphia, including S.G. Phillips Constructors, Inc. v. City of  
3 Burlington, 45 F.3d 702, In re BKW Sys., 66 Bankr. 546 (Bankr. D.N.H. 1986), National  
4 Developers, Inc. v. Ciba-Geigy Corp., 803 F.2d 616 (11<sup>th</sup> Cir. 1986) and Gulf States Exploration  
5 Co. v. Manville Forest Products Corporation, 896 F.2d 1384 (2<sup>nd</sup> Cir. 1990) are distinguishable.  
6 They do not involve facts similar to ours, where the insurance companies of Adelphia, settled with  
7 Plaintiffs, and seek reimbursement of those settlement funds from the insurance company of  
8 Pauley. In addition, they are out-of-circuit.

9 Adelphia further asks the Court to consider its motion to transfer first, but it only filed this  
10 motion on June 7, 2007. It would be unfair to Pauley to have the Court rule on the motion to  
11 transfer on June 28, 2007, before Pauley has had a reasonable opportunity to research and oppose  
12 the transfer motion, which is not set to be heard until July 26, 2007. This case has been pending in  
13 San Francisco since April 2003 and the majority of witnesses are located within the jurisdiction of  
14 the Northern District of California with no witnesses in New York. Finally, there is no sound  
15 basis for reconsideration of Pauley's claim by the Bankruptcy Court, since this case is clearly an  
16 issue between insurers. Any resolution of Adelphia's pleading will affect the carriers, not the  
17 parties and not Adelphia's estate.

18 Furthermore, Pauley, through its insurance carrier, contributed \$10 mil. towards the  
19 settlement with Plaintiffs. Adelphia further fails to show how Pauley, through its insurers, realized  
20 a \$5 million value. Significantly, the \$5 million paid to Plaintiffs by Adelphia was paid by  
21 Adelphia's general liability insurance carriers, Liberty Mutual Insurance Company and Royal &  
22 Sun Alliance Insurance Company, not by Adelphia's estate, so this sum was not paid out of the  
23 Chapter 11 bankruptcy estate. This is pivotal.

24 The "exclusive jurisdiction" language cited by Adelphia at page 3 of its Opposition  
25 certainly does not apply to this situation, where *the insurance carriers* of Adelphia have paid  
26 settlement monies to Plaintiffs and Adelphia's *insurance carriers* seek reimbursement of these  
27 monies, based on the indemnity clauses contained in the Adelphia/Pauley contract. Nowhere does

1 Adelphia plead that it assumed the contract with Pauley, so it is rejected and breached. Thus, the  
2 subject civil proceeding (Adelphia's Second Amended Cross-complaint) is not related to  
3 bankruptcy.

4 Here, there is no close nexus to the bankruptcy plan or proceeding sufficient to uphold  
5 bankruptcy court jurisdiction. See In re Valdez Fisheries Development Association, Inc. v. Sea  
6 Hawk Seafoods, Inc., 439 F.3d 545, 550 (9th Cir. 2006), which held that a proceeding between the  
7 parties was not one to vindicate the court's authority or to effectuate its decree, thus the  
8 bankruptcy court lacked jurisdiction. In In re Valdez, the Bankruptcy Court, which had approved a  
9 settlement agreement, lacked jurisdiction to interpret that agreement in an adversary proceeding  
10 between two creditors brought after the closing and dismissal of the underlying bankruptcy case.  
11 Id. Similarly, here, the plan has been confirmed, so the Bankruptcy Court lacks jurisdiction to  
12 preside over the Adelphia cross-action.

13 Additionally, in In re Fietz, the 9<sup>th</sup> Circuit Court Of Appeals adopted the Third Circuit's  
14 articulation of the test for determining whether a civil proceeding is related to bankruptcy, stating  
15 that an action is related to bankruptcy if "the outcome of the proceeding could conceivably have  
16 any effect on the estate being administered in bankruptcy." (852 F.2d 455, 457 (9th Cir. 1988),  
17 quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984).) In Fietz, the Court held that  
18 there was no "related to" jurisdiction over a claim, though part of the bankruptcy estate, if it was  
19 filed after the Chapter 13 plan had been confirmed and all of the property of the estate had vested  
20 in the debtor. (Id. at 458-459.)

21 Here, Adelphia seeks to first remove this action to the United States District Court,  
22 Northern District of California, then transfer it to the Southern District of New York Bankruptcy  
23 Court, pursuant to its April 25, 2007 Notice of Removal and June 7, 2007 Motion to Transfer. The  
24 Motion to Transfer was filed concurrently with Adelphia's Oppositions to Pauley's Motions to  
25 Remand and Dismiss. However, according to Adelphia's Opposition to Pauley's Motion to  
26 Remand, the Bankruptcy Court confirmed Adelphia's Chapter 11 bankruptcy plan on January 5,  
27 2007. Therefore, since the plan has been confirmed, the Bankruptcy Court's ability to preside over

1 this action could not conceivably “alter the debtor’s rights, liabilities, options, or freedom of action  
 2 (either positively or negatively) and which in any way impacts upon the handling and  
 3 administration of the bankrupt estate.” (Fietz, 852 F.2d at 457, quoting Pacor, 743 F.2d at 994).)

4 Moreover, the outcome of Adelphia’s Second Amended Cross-complaint has no  
 5 conceivable effect on the estate being administered in bankruptcy. Compare In re Pegasus Gold  
 6 Corp., 394 F.3d 1189, 1194 (9th Cir. 2005), where the 9<sup>th</sup> Circuit Court of Appeals found the  
 7 requisite close nexus to exist where the post-confirmation claims asserted that the defendant  
 8 breached the reorganization plan and where the outcome of those claims could affect the  
 9 implementation and execution of the plan, with our facts, which show that Adelphia’s estate will  
 10 never be affected, augmented or detracted, because this is an insurer case, not within the purview  
 11 of the Bankruptcy Court. Here, Adelphia’s insurance carriers seek reimbursement from Pauley’s  
 12 insurance carriers for the \$5 million in settlement funds paid on behalf of bankrupt party Adelphia  
 13 to Plaintiffs and the recoupment of Adelphia’s attorneys’ fees and costs, incurred by Adelphia’s  
 14 defense counsel, who were retained by Adelphia’s insurance carrier.

15 In addition, Adelphia’s Opposition makes reference to 28 U.S.C. § 1478 at page 5, lines  
 16 25-28 and page 6, lines 1-7, however this statute is not contained within its Notice of Removal and  
 17 is mis-cited here. Moreover, there is a difference between an affirmative defense and an  
 18 affirmative claim. Here, Pauley could not file an affirmative claim for Adelphia’s breach of  
 19 contract in Bankruptcy Court, or any other Court, given the automatic stay. However, it can raise  
 20 an affirmative defense. This does not mean that an affirmative defense raised in the Cross-action  
 21 automatically gives the Bankruptcy Court “exclusive jurisdiction.” Furthermore, the cases cited  
 22 by Adelphia, National Developers, Inc. v. Ciba-Geigy Corp., 803 F.2d 616 (11<sup>th</sup> Cir. 1986) and  
 23 Twyman v. Wedlo, Inc., 204 B.R. 1006, 1011 (N.D. Ala. 1998) are inapposite as well as out-of-  
 24 circuit.

#### 25 **B. Adelphia Did Not Timely Remove This Matter.**

26 Adelphia’s argument that it just ascertained issues giving rise to removal is inaccurate. On  
 27 June 15, 2004, a stipulation and order was entered into between Plaintiffs, Adelphia and United



1 States Bankruptcy Judge Robert E. Gerber, modifying the automatic stay, allowing Plaintiffs to  
2 pursue recovery from Adelphia, limited to the proceeds available under Adelphia's third party  
3 insurance proceeds. Specifically, Plaintiffs were allowed to pursue recovery from Royal Insurance  
4 Company, under general insurance liability policy number PTV464039 and umbrella policy issued  
5 by Liberty Mutual Insurance Company under policy number TH1641004429. (See Exhibit B to  
6 Declaration of Jeffrey M. Vucinch in Support of Pauley's Motion to Remand.) These insurers are  
7 indeed the real parties in interest in Adelphia's Cross-action. Pursuant to this lift on the automatic  
8 stay, Adelphia Cross-complained against Pauley. Therefore, the State Court has jurisdiction over  
9 Adelphia's Cross-action.

10 In fact, in settling with Plaintiffs, \$1 million was paid to Plaintiffs by Royal, while Liberty  
11 Mutual sent Plaintiffs a \$4 million settlement check. Pauley does not see how Adelphia's Second  
12 Amended Cross-complaint against Pauley has anything to do with the Adelphia bankruptcy estate.  
13 Further, while being mindful of F.R.C.P. 11, Pauley asks Adelphia to represent that recovery from  
14 Pauley, if any, is going to augment the bankruptcy estate. See Imperial Corp. of Am. v. Milberg,  
15 Weiss, Bershad, Spechtrie & Lerach, 144 B.R. 115, 119 (Bankr. S.D. Cal. 1992), (Plaintiffs failed  
16 to show that exercise of bankruptcy court jurisdiction over insurance proceeds was required to  
17 prevent immediate and irreparable harm to the pool of insurance proceeds and plaintiffs failed to  
18 establish recovery of the indemnification proceeds would be recovery of the debtor's interest in  
19 property, as required by § 547(b).)

20 The Cross-complaint is not about reimbursing the bankruptcy estate. Payment of the  
21 Pauley claim was Pauley's only recourse to get paid for work done, since Pauley's claim for breach  
22 of contract against Adelphia was precluded by the automatic stay. Pauley had no election of  
23 remedies.

24 Moreover, Pauley's Motion for Judgment on the Pleadings, served on Adelphia on January  
25 8, 2007, states in relevant part, "In fact, Adelphia's ability to perform its obligations under the  
26 contract was extinguished on June 25, 2002, when it filed Chapter 11 Bankruptcy. Here,  
27 Adelphia's counsel cannot certify that Adelphia has performed or is excused from performing its

contractual duties under the July 7, 2000 Adelphia - Pauley contract.” Moreover, Pauley’s Reply to Adelphia’s Opposition thereto, served on Adelphia on February 6, 2007, states in relevant part, “On June 25, 2002, Adelphia filed for Chapter 11 Bankruptcy, thus breaching the contract. Adelphia’s attempt to amend its Cross-complaint now is unwarranted by existing law and lacks evidentiary support.” Surely the language contained in Pauley’s motion for judgment on the pleadings gave Adelphia enough to “ascertain” then that this action could be removed. Pauley respectfully requests that its motion to remand be granted.

### III.

#### PAULEY’S REPLY TO ADELPHIA’S OPPOSITION TO MOTION TO DISMISS 12(b)(6)

Adelphia’s nonpayment under the contract with Pauley constituted a breach. Adelphia rejected the contract, which is deemed a material breach, immediately before Adelphia filed bankruptcy. Pauley does not owe Adelphia indemnity, since Adelphia was negligent and that negligence was a proximate cause of Mr. Tuiaki’s injuries.

Adelphia, the party in material breach, is not entitled to sue Pauley for damages under the contract that it breached. See Amelco Electric v. City of Thousand Oaks, (2002) 27 Cal.4th 228, 238. (“... [T]he breaching party can not require the non-breaching party to continue to perform what is left of the contract...Such a material breach has the effect of freeing the contractor of its obligations under the contract, including its obligations under the disputes clause.”); See also Gill v. Rich, (2005) 128 Cal.App.4th 1254, 1276. (“A breaching party may not escape contractual liability when the contract is canceled due to his or her own breach...If a contract is canceled for the other party’s breach, damages are still owed.”)

While Adelphia pleads and argues that on January 5, 2007, the bankruptcy plan was confirmed, nowhere in its Opposition papers does it plead or argue that it assumed the subject contract. It does not appear as though Adelphia can so plead or so argue. In fact, Adelphia even goes so far to say “It is unclear...whether the PAULEY - ADELPHIA contract was assumed or rejected.” If the plan was confirmed, then Adelphia has to know whether the contract was



1 assumed or not. Who other than Adelphia would know whether the contract was assumed? It was  
2 not assumed, thus it was rejected. The result is that the contract was breached. By the time a plan  
3 is confirmed, all executory contracts are expressly assumed or deemed rejected.

4 In addition, Adelphia's assertion that Pauley must prove that the underlying contract was  
5 executory is proved by Adelphia's Second Amended Cross-complaint. Therein, Adelphia states  
6 that it filed for Chapter 11 bankruptcy on June 25, 2002, while the subject contract was in full  
7 effect. It goes on to state that Pauley submitted a claim for monies owed between November 15,  
8 2001 through July 16, 2002. Thus, Pauley was performing construction services pursuant to  
9 contract, but Adelphia failed to pay for that work. It follows, therefore, that Adelphia's failure to  
10 pay was a breach of the executory contract. In addition, the fact that the plan was confirmed in  
11 January 2007, without ever assuming the Pauley/Adelphia contract means that the contract is  
12 deemed breached by Adelphia immediately before June 25, 2002. See 11 U.S.C. § 365(g).  
13 ("[T]he rejection of an executory contract...of the debtor constitutes a breach of such contract...(1)  
14 if such contract...has not been assumed under this section or under a plan confirmed under chapter  
15 11...immediately before the date of the filing of the petition.")

16 Adelphia seeks money and indemnity from Pauley. Surely, it is incumbent on Adelphia to  
17 show that it assumed the contract, not the other way around. Again, Adelphia claims that it has no  
18 idea whether it assumed the contract and further admits that it cannot locate Schedule 14.1, which  
19 may or may not show that the subject contract was assumed. Obviously, the contract was not  
20 assumed, because if it had been, Pauley's claim would have been denied.

21 Finally, if Travelers is the real party in interest, as claimed by Adelphia, then the same  
22 follows that Adelphia's insurers, Royal and Liberty Mutual, not Adelphia or its estate, are the real  
23 parties in interest. As a last note, Adelphia's fourth and fifth causes of action (for implied  
24 equitable indemnity and contribution respectively) must be dismissed. Adelphia did not address  
25 these causes of action in its Opposition. Pauley respectfully requests that its motion to dismiss be  
26 granted.  
27

1 ///

2 DATED: June 11, 2007

CLAPP, MORONEY, BELLAGAMBA  
and VUCINICH

By: \_\_\_\_\_

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PAULEY CONSTRUCTION, INC.